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WARNER PARTIES

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

FOURTH AGE LIMITED, *et al.*,
Plaintiffs,

v.

WARNER BROS. DIGITAL DISTRIBUTION,
INC., *et al.*,
Defendants.

Case No. 12-cv-09912-ABC (SHx)

Hon. Audrey B. Collins

**THE SAUL ZAENTZ
COMPANY'S AND WARNER'S
NOTICE OF EN BANC
PROCEEDINGS**

Date: July 22, 2013
Time: 10:00am
Courtroom: 680

1 Defendants and Counterclaim Plaintiffs The Saul Zaentz Company (“Zaentz”) and
2 the Warner Parties (“Warner”) wish to bring to the Court’s attention developments in the
3 Ninth Circuit relevant to Counterclaim Defendants’ Special Motions to Strike pursuant to
4 California Code of Civil Procedure Section 425.16 (Dkt. Nos. 42 & 43), which are
5 presently set to be heard by this Court on July 22.

6 In *Makaeff v. Trump University, LLC*, No. 11-55016 (Apr. 17, 2013), two judges
7 of the Ninth Circuit expressed the view that *United States ex rel. Newsham v. Lockheed*
8 *Missiles & Space Co.*, 190 F.3d 963 (9th Cir. 1999), which allows special motions to
9 strike under Section 425.16 of the California Code of Civil Procedure (the “California
10 anti-SLAPP statute”) to be brought in federal court, was wrongly decided and should be
11 overruled. Slip. Op. at 33-40 (Kozinski, J., concurring); *id.* at 40-42 (Paez, J.,
12 concurring).

13 Judges Kozinski and Paez called for the Court of Appeals to rehear the *Makaeff*
14 case en banc for the purpose of reconsidering whether the California anti-SLAPP statute
15 may be invoked in federal court. *Id.* at 40 (Kozinski, J., concurring). Appellee Trump
16 University subsequently petitioned for rehearing en banc. And the Ninth Circuit has
17 ordered Appellant Tarla Makaeff to file a response to the petition, which is due by June
18 13, 2013. In light of these developments, it appears that there is a substantial chance that
19 the Ninth Circuit will reconsider *Newsham* and the availability of the special motion to
20 strike procedure in federal court.

21 If rehearing en banc is granted and the Ninth Circuit overrules *Newsham*,
22 Counterclaim Defendants’ Special Motions to Strike will have to be denied as improperly
23 seeking to invoke a state-law procedural mechanism that is not available to litigants in
24 federal courts. Counterclaimants therefore request that the Court defer ruling on
25 Counterclaim Defendants’ special motions to strike until such time as: (a) the Ninth
26 Circuit resolves the petition for rehearing in *Makaeff*, or (b) if rehearing en banc is
27 granted, the court decides the question of whether the anti-SLAPP procedure that
28 Counterclaim Defendants purport to invoke is actually available in federal litigation.

1 No party will be adversely affected should the Court elect to await further
2 guidance from the Ninth Circuit. Counterclaim Defendants will still be able to pursue
3 resolution of their motion to dismiss under Fed. R. Civ. P. 12(b)(6) and will preserve their
4 ability to have their special motion to strike resolved, in the event that the Ninth Circuit
5 decides it is an available procedure in federal court. In the meantime, the Court will not
6 need to spend time resolving a motion that the Ninth Circuit may conclude is not
7 available in this case. Moreover, given the overlap in the facts underlying the claims and
8 counterclaims in this case, no party's discovery burdens should be significantly affected if
9 the Court defers resolving the special motion to strike. The parties will need to conduct
10 essentially the same discovery regardless of how the Court rules. Indeed, discovery,
11 which is not stayed by the pendency of a special motion to strike in federal court, *see*
12 *Metabolife Int'l, Inc. v. Wornick*, 264 F.3d 832, 845 (9th Cir. 2001), is already underway.

13 For all of these reasons, the Court should defer ruling on Counterclaim
14 Defendants' special motion to strike until after the Ninth Circuit either resolves the
15 question of whether such motions are available in federal court in the *Makaeff* case or
16 decides not to rehear the case en banc.¹

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27 ¹ Should the Court so order, Zaentz and Warner will provide the Court with additional
28 briefing showing why Counterclaim Defendants' Motions to Strike are procedurally
improper in this forum.

1 Dated: May 29, 2013

ARNOLD & PORTER LLP

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3 By: /s/ John C. Ulin

4 Attorneys for Defendant and Counterclaim
5 Plaintiff THE SAUL ZAENTZ COMPANY
6 d/b/a Middle-earth Enterprises, a Delaware
7 corporation

8 Dated: May 29, 2013

O'MELVENY & MYERS LLP

9 By: /s/ Daniel M. Petrocelli

10 Attorneys for Defendants and Counterclaim
11 Plaintiffs WARNER PARTIES

12 Pursuant to Local Rule 5-4.3.4(a)(2)(i), the filer attests that all other signatories
13 listed, and on whose behalf the filing is submitted, concur in the filing's content and
14 have authorized the filing.
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